

MINUTES

INSOLVENCY LAW COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA

July 18, 2002

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on July 18, 2002 at the Oakland Airport Hilton.

The following members were present in person:

Rob Harris
Eric Nyberg
Ben Young

The following members attended telephonically:

David Bertenthal
Peter Bronson
Lou Cisz
Bruce Emard
Lynn Ernce
Steve Felderstein
Radmila Fulton
David Honig
Dean Kirby
Perry Landsberg
Ben Murphy
Rhonda Nelson (Executive Committee Liaison)
Larry Peitzman
Tom Phinney
David Shemano

Also present in person was invited guest Edith Warkentine.

Ben Young called the meeting to order at approximately 10:00 a.m.

Recruiting and Election of New Members (part 1).

Ben Young circulated a committee roster in order to show the slots which needed to be filled: one one-year and eight three-year terms. Ben reported that three applications had been received and were included in the meeting package (former Judge Lisa Hill Fenning, Dan S. Schechter and Robert A. Franklin), and David Shemano had submitted his application for a three-year term. All members were urged to encourage additional applications.

Consideration of applications received was deferred until later in the meeting due to initial lack of a quorum.

Approval of Minutes: May 17, 2002.

The minutes of the May 17, 2002 meeting were approved unanimously.

Website Report and Constituency Outreach Project (Rob Harris).

Website. Rob Harris reported that he is having trouble getting his updates onto the State Bar website, and is continuing to try to accelerate the process.

Outreach/Constituency List. Rob reported that we have given our comments with regard to additional groups to be added to the list of organizations. All members will be receiving the constituency list via e-mail, and should review it for other organizations that might be appropriate for addition, with a view to drawing more lawyers into the section and possibly onto the committee.

Recruiting and Election of New Members (part 2).

Late-arriving members having produced a quorum, the committee returned to the subject of new members. Judge Fenning and Messrs. Franklin, Schechter and Shemano were unanimously approved for three-year terms on the committee.

Edith Warkentine, Chair of the Executive Committee of the Business Law Section and a guest at our meeting, advised that the committee is permitted to add new members anytime there is a vacancy.

Presentation by Edith Warkentine.

Edith Warkentine spoke to the committee concerning the communications problems that arose in connection with SB 399.

Edith expressed her gratitude and appreciation for our committee's involvement in the legislative process, and said we are one of the Bar's most active and productive committees. She said SB 399 was a bill that first had been circulated years ago, and that there had been much discussion over the years concerning what sort of notice provisions should be required.

Rob Harris responded that it would have been easier for our committee to respond to the section's request for comment if the history of the bill, and the import of what was being asked of our committee, had been fully explained. Rob expressed agreement with Edith on the importance of good communication on such matters.

Edith said the Section Executive Committee will endeavor to timely circulate relevant legislative proposals to the chairs of all standing committees.

Rhonda Nelson informed the committee that the most recent version of SB 399 had been approved by the Legislature, and that the Governor was expected to sign it.

Edith said the Section will be instituting a major section membership drive, targeting former members, non-members, program attendees and purchasers of publications, and offering free section membership for the balance of 2002. She said this will be the first major membership drive since 1994, at which time there was a 70% member retention rate in the following year.

She also said several new publications are being offered to section members, either in hard copy format or via pdf downloads. Postcards are being mailed to section members to inform them about these publications.

Progress Reports on Current Projects.

Re-Indexing legislation. Rob reported that the Law Revision Commission is looking into raising the exemption figures, but is also considering indexing. He will talk to the CLRC about the status of the project, and particularly concerning the report that at least one creditor group is opposed to indexing.

Rob said he had worked with Terry Miller to research the legislative history, and had concluded that the committee could amend its alternative legislative proposal either to provide for indexing per CCP Section 703.120 or to delete reference to that code section entirely. Rob said both Miller and Larry Doyle think a telephone conference should be arranged with staff judiciary committee members by way of ensuring that our committee does not make a proposal that the Law Revision Commission will not support.

Rob further said he does not think the language of our ALP is at all inconsistent with the language of the statute. He plans to maintain the language as it now stands, amend it as indicated, and run it by the committee before the board of governors meets on August 5.

Rhonda said that if the board approves the proposal as amended, it will go to Terry Miller for the purpose of seeking a sponsor.

CLRC Items of Interest. Ben said there is nothing germane on the CLRC agenda at this time.

State Bar Programs.

Tom Phinney confirmed that he and Judy Gibbs will be presenting a two-hour program on the effect of bankruptcy on state court litigation at the State Bar Annual Meeting in October. The program is set for Thursday, October 10 from 2:15 to 4:15 p.m.

Peter Bronson confirmed that he, Geraldine Valdez, and Bankruptcy Judges Edward Jellen and Thomas Holman will be presenting a three-hour bankruptcy primer course at the Annual Meeting, on Friday, October 11 from 2:15 to 5:45 p.m.

It was noted that our committee will be meeting Thursday, October 10, and that the section breakfast is scheduled for Friday morning, October 11.

New Projects.

ILC Comment re Attorney Liability Provisions of the Bankruptcy Bill. Judy Gibbs was not present to discuss this item. Ben reported that the bankruptcy reform legislation is still stuck in conference committee, and that there is continuing disagreement over the language relating to dischargeability of obligations arising from anti-abortion activities.

Petition Preparer Issues. Discussion was deferred because Steve Johnson was on vacation.

U.S. Trustees. Ben noted that Linda Stanley was recently removed as U.S. Trustee for the Northern District, and that William Neary had been appointed as acting U.S. Trustee. Ben said Steve Johnson has undertaken to invite Neary to attend a meeting of our committee.

Dean Kirby reported that Brenda Whinery had resigned as acting U.S. Trustee for the Southern District, and that Maureen Tighe is now covering both the Central and Southern Districts.

AB 2914 – Attorney disclosure of prior/pending bankruptcy to clients. Dean reported that nothing is happening in connection with this bill, and that the Judicial Committee hearing on it had been called off. Dean will call Terry Miller to see if the bill is dying a natural death; if it still appears viable, Dean will comment on it per the committee's prior vote.

AB 2473 – Requirement that bankrupt business continue to honor gift certificates. Rob said, first, that he was not sure there was a consensus among the committee members. Rob commented that this bill would create, in effect, a secret priming lien, draining saleable assets from the certificate issuer's bankruptcy estate without permitting such assets to be dealt with pursuant to a plan. Rob said a possible solution would be to give the gift certificate claims the same priority [11 U.S.C. § 507(a)(6)] as consumer deposits.

Discussion ensued. Dean suggested that any comment by the committee should be from the standpoint of how to accomplish the Legislature's goal of protecting an under-represented consumer class. Larry Peitzman said he was not sure he agreed, and that there are other consumer issues not dealt with by this bill, *e.g.*, merchandise returns and store credits.

Rob said he will go ahead and write a comment, giving all the points of view expressed and pointing out the risks of the proposed legislation. Rob will also point out that bankruptcy judges already can authorize the honoring of gift certificates on a case-by-case basis, and that

Section 507(a)(6) offers some protection as well. Also, Rob will explain that clarification of any ambiguities in the relevant bankruptcy law is really Congress' province, and that any change might more appropriately come in the form of a Bankruptcy Code amendment.

Dean said the bill has gone "to third reading", and is shown as having last been amended June 18, 2002. Lynn Ernce said she would obtain the latest amendment and send it to Rob, but that there were no major changes.

Dean pointed out that updated information about the status of specific proposed legislation can be obtained at www.leginfo.ca.gov.

AB 1948 – bankrupt local health care district excused from paying its share of operating expenses to LAFCO. The committee had decided not to comment on this bill, and Lynn was following up with the Health Care Committee to see if it planned to get involved. Lynn reported that the Health Care Committee had not met yet, so it was not known whether it would be commenting.

AB 2144 – Life/Health Insurance Guarantee Association obligation when succeeding to rights of insolvent insurer. Lynn said she had not been able to speak with anyone on the Insurance Committee, but that the matter was moot because the bill had already passed.

Other new legislation. Lynn said there are no new bills with which the committee should be concerned. However, it was noted that there is proposed Congressional legislation regarding corporate fraud accountability, and that both the House and Senate bills would amend Bankruptcy Code Section 523(a) by adding a subsection (19) making claims for violations of the securities laws non-dischargeable.

Next Meeting.

The next meeting will take place September 12th in Los Angeles. It was noted that new committee members will be invited to the October 10th meeting as guests, and that the new terms will start thereafter.

Meeting adjourned.

Peter Bronson
Secretary Pro Tem